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Staggering Punitive Damages against Labor Unions

Thurlow Smoot

"Staggering Punitive Damages" Against Labor Unions*

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THE TWO U. S. SUPREME COURT DECISIONS rendered in late May, 1958, involving labor unions,[1] have received widespread publicity, have been the subject of much editorial and other comment, and have caused considerable consternation among labor unions and among some employers who see where they may be involved. Now upon analysis, are the rulings of great significance, worthy of the concern they have caused, portending something new in labor relations? The probability is that they are.

The Precise Holdings

What the cases actually hold can be stated briefly. In *UAW vs. Russell,* Justice Burton, writing the majority opinion, stated the sole issue to be "whether a state court . . . had jurisdiction to entertain an action by an employee . . . against a union . . . for malicious interference with such employee's lawful occupation." And the Supreme Court's answer was that a state court had such jurisdiction, thus affirming an Alabama Supreme Court decision allowing one Paul Russell to recover $10,000 damages from the UAW[2] for preventing him from working during a strike. Russell was an hourly employee and not eligible to representation by the union which had called the production employees out on a legal strike. Russell was kept out of the plant, so the Alabama jury had found, by illegal activities of the pickets; i.e., they physically stopped him from driving his car through the picket line into the plant. In the companion case, *IAM vs. Gonzales,* Justice Frankfurter, writing the majority decision,

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* Warren, Chief Justice, in his dissent in UAW vs. Russell, 78 S. Ct. 932, at p. 943, states "There is a very real prospect of *staggering punitive damages* accumulating through successive actions by parties injured by members who have succumbed to the emotion that frequently accompanies concerted activities during labor unrest." (Emphasis added.)

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1 UAW vs. Russell, 78 S. Ct. 932 (1958), and IAM vs. Gonzales, 78 S. Ct. 923 (1958).

2 International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-CIO.

posed the question to be whether a state court had jurisdiction to award damages to Marcos Gonzales, who, after being illegally expelled from the IAM,[3] was denied work through the union hiring hall. Again the Supreme Court upheld the state court's jurisdiction.

In upholding the state court's jurisdiction in each of these cases, the Supreme Court made two significant rulings: a) that the doctrine of pre-emption was not applicable and therefore not a defense to the unions here, and b) that punitive damages could be awarded. Each ruling is important.

The Pre-emption Doctrine

The long-established doctrine of pre-emption is that action by states cannot frustrate a federal act. It was first applied in the labor relations field in 1952, in the *Garner* case.[4] The Supreme Court there held that the National Labor Relations Act, as amended, established the pattern of rights and remedies with respect to certain conduct of unions and that state action therefore could not derogate, supplement or duplicate those rights. The remedies consist of National Labor Relations Board cease-and-desist orders which may include reinstatement of an employee to his job with back pay for time lost. Subsequent Supreme Court decisions have explained and expanded[5] the doctrine of pre-emption in the labor field. In *Laburnum*[6] the Supreme Court limited the doctrine by allowing state courts to award damages to an employer whose plant had been closed down through force and violence initiated by a union representing none of his employees. The Court stated that it "sustained the state judgment on the theory that there was no compensatory relief [for the employer] under the federal act and no federal administrative relief with which the state remedy conflicted." [7]

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[3] International Association of Machinists.

[4] Garner vs. Teamsters Union, 346 U. S. 485.

[5] Weber vs. Anheuser-Busch, Inc., 348 U. S. 468 (1955); Amalgamated Meat Cutters and Butcher Workmen vs. Fairlawn Meats, Inc., 353 U. S. 20 (1957); Guss vs. Utah Labor Relations Board, 353 U. S. 1 (1957); United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-CIO vs. Wisconsin Employment Relations Board and Kohler Company, 351 U. S. 266 (1956); Youngdahl vs. Rainfair, Inc., 355 U. S. 131 (1957).

[6] United Construction Workers vs. Laburnum Construction Company, 347 U. S. 656 (1954).

[7] As digested by the Supreme Court itself in speaking of the Laburnum case in Weber vs. Anheuser-Busch, Inc., 348 U. S. 468 (1955).

Now the Supreme Court in the *Russell* case was considering the question of tortious conduct by a union where the federal act *did* protect the employee's right to work and *did* supply the compensatory remedy of back pay for time lost. The court held that although the federal board could award back pay, "Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct" and therefore the state court action was allowed. And now in the *Gonzales* case, the Supreme Court was ruling that the federal act did not pre-empt state court action because the federal board could not order Gonzales reinstated in the labor union from which he had been expelled and it was not mandatory for the Board to order the union to pay him his back pay, therefore the state court action was needed to "fill out" the remedy by an award of damages.[8]

Chief Justice Warren wrote the dissenting opinions in each case.[9] In *Russell,* the Chief Justice said it was unnecessary to decide whether the Board had duplicate remedial authority as:

> This is a case in which the State is without power to assess damages whether or not like relief is available under the federal act. Even if we assume that the Board had no authority to award respondent back pay in the circumstances of this case, the existence of such a gap in the remedial scheme of federal legislation is no license for the States to fashion correctives. . .. The federal act represents an attempt to balance the competing interests of employee, union and management. By providing additional remedies, the States may upset that balance as effectively as by frustrating or duplicating existing ones.[10]

In *Gonzales,* the Chief Justice said the court and particularly Justice Frankfurter were discarding the pre-emption doctrine:

> In a pre-emption case decided upon what now seem to be discarded principles, the author of today's majority opin-

[8] Heretofore state and federal courts, and the Supreme Court by denying certiorari, had denied on the ground of pre-emption the recovery of damages by an employee from a union for interference with his employment because of non-membership in the union. Borne vs. Laube, 213 F. 2d 407 (C. A. 9, 1954) (reh'ng. denied, 214 F. 2d 349, cert. den., 348 U. S. 855 (1954)); McNish vs. American Brass Co., 139 Conn. 44, 89 A. 2d 566 (1953) (cert. den., 344 U. S. 913 (1953)); Mahoney vs. Sailors' Union of the Pacific, 45 W. 2d 453, 285 P. 2d 440 (1954); (cert. den., 349 U. S. 915 in 1955); and Sterling vs. Local 438, Liberty Ass'n. of Steam and Power Pipefitters and Helpers Ass'n., 207 Md. 132, 113 A. 2d 389 (1955) (cert. den., 350 U. S. 875 in 1955).

[9] Justice Douglas was with the Chief Justice on the dissent and Justice Black did not participate in the decisions.

[10] 78 S. Ct. 932, at p. 941.

ion declared: 'Controlling and therefore superseding federal power cannot be curtailed by the State even though the ground of intervention be different than that on which federal supremacy has been exercised,' *Weber vs. Anheuser-Busch, Inc.* I would adhere to the view of pre-emption expressed by that case and by *Garner vs. Teamsters, C. & H. Local Union,* and reverse the judgment below.[11]

But despite a division in the court on what it was doing generally to the doctrine of pre-emption, specifically the court ruled that doctrine to be no longer applicable in any tort or breach of contract cases against unions.

The Law of Torts Applies

With the defense of pre-emption out, the general law of torts is applicable and unions revert to being liable in an action for torts committed by union agents. That the tort was committed on a legal picket line or in connection with a legitimate labor dispute is immaterial.[12] So the *Russell* case, where the tort was "wrongful interference with a lawful occupation" and the *Gonzales* case where, although grounded on breach of contract, the cause was among those cases holding that a wilful breach of contract is a tort,[13] the principle affirmed by the court allowing damage suits against unions was not actually expanded nor enlarged.[14] The new element, however, is that the torts here involve only loss of wages without physical injury and union leaders and attorneys always had presumed that labeling a loss of work case a "tort" was merely semantics as all loss of work cases were to be decided by the federal board and they had thought that a cease-and-desist order and payment of back pay

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[11] 78 S. Ct. 923, at pp. 931, 932.

[12] "In considering the legality of the strike, picketing and the boycott, the distinction should always be kept in mind between such forms of concerted action, as such, and conduct which is tortious whether connected with the labor dispute or not. Thus, trespass, assault and battery, and wilful destruction of property are wrongful and not less so because done in connection with a strike or picket line." Harper and James, *Law of Torts,* p. 524 (1956).

[13] Taylor vs. Atcheson, Topeka and S. F. Railway, 92 F. Supp. 968 (D. C. Mo., 1950).

[14] In the Russell case, the union conceded "the states' power to award damages against . . . a union for physical injuries . . ." and in Gonzales, the union did "not attack so much of the judgment [of the California court] as ordered the [Gonzales] reinstatement," 78 S. Ct. 932, at p. 941 (Russell); and 78 S. Ct. 923, at p. 924 (Gonzales). See also Hall vs. Walters, 226 S. C. 430, 85 S. E. 2d 729 (1955), cert..den., 349 U. S. 953 (1955); Real vs. Curran, 138 N. Y. S. 2d 809 (1955).

was the heaviest penalty possible. Since even this penalty had been originated only by the Taft-Hartley amendments in 1947, unions considered this to be one of the odious portions of that law. Only recently have they recognized the advantages of the Taft-Hartley Act pre-empting the field from state courts and this somewhat mollified them toward that portion of the federal act. Now unions[15] must face the fact that Taft-Hartley was much the lesser ill. As their actions in loss-of-work cases are to be scrutinized by juries aided by judges,[16] they find themselves in agreement with the Chief Justice in decrying the weakening of the federal act:

> . . . Differing attitudes toward labor organizations will inevitably be given expression in verdicts returned by jurors in various localities. The provincialism this will engender in labor regulation is in direct opposition to the care Congress took in providing a single body of nationwide jurisdiction to administer its code of labor regulation.[17]

Nevertheless, a weakened federal act or not, juries are going to be scrutinizing union actions in loss-of-work cases and this is not a minor problem. For instance, in the *Russell* case in the state court, the union presented considerable evidence upon which the jury could have found that the company involved in the strike told its hourly and office employees not to attempt to come to work. But the jury found the employees could have worked had they been able to get through the picket line. Further, there was evidence showing that Russell instigated the

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15 And possibly employers also as Chief Justice Warren in his dissent in the Russell case asks "Must we assume that the employer who resorts to a lockout is also subject to a succession of punitive recoveries at the hands of his employees?" Dissenting opinion, UAW vs. Russell, 78 S. Ct. 932, at p. 943.

16 In the Russell case, the Trial Judge charged as follows:

> "I charge you that unless you are reasonably satisfied from the evidence in this case that the proximate cause of [Russell's] inability to work at the Decatur Plant during the period from July 18, 1951 to August 22, 1951, was that a picket line was conducted by the [union] in a manner which by force and violence or threats of force and violence prevented [Russell] from entering the plant, and unless you are reasonably satisfied from the evidence that work would have been available to [Russell] in the plant during said period, except for the picketing in such manner, you should not return a verdict for [Russell]."
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> "6. I charge you that unless you are reasonably satisfied from the evidence that the acts complained of by [Russell] occurred, and that [Russell] suffered a loss of wages as the natural and proximate result of said acts, you should return your verdict for the [union]." (78 S. Ct. 932, at p. 935, footnote 3).

17 Dissenting opinion, UAW vs. Russell, 78 S. Ct. 923, at p. 942.

trouble on the picket line; was organizer of a back-to-work movement and initiated petitions headed "If the Company will reopen the gates to the people, we will cross the picket line and return to work"; obtained signatures to the petition; ran newspaper advertisements; had opposed the organization of the union and the calling of the strike and after the strike, organized a club whose purpose was "carrying on the employer-employee functions without the intervention of any union," and he initiated a petition to decertify the union as bargaining representative for the employees and initiated the idea of instituting damage suits against the union and solicited others to file their damage suits.[18] But this evidence of Russell's activities during the five-week strike did not deter the jury from awarding him $500.00 for loss of pay and $9,500 for the mental anguish he suffered through the five-week loss of work.

In the *Gonzales* case, the lower court in California found that there was sufficient evidence to support the IAM's determination that Gonzales was guilty of the offense with which he was charged within the union—falsely accusing a union officer of having assaulted him. It nevertheless found that the penalty for the offense was not imposed in accordance with the internal procedures prescribed by the union and its parent body, and for that reason the union could not lawfully expel respondent from membership for refusing to pay the fine assessed against him.[19] Undisputed, however, is the fact that the union was wrong in thereafter keeping Gonzales from working.

Thus, juries are to determine the merits of labor disputes for which the expertness of the federal board heretofore was considered necessary.[20] And any loss of work caused by a labor dispute, later found by a jury to have been wrongfully caused, results in damages paid to those losing work even though they are active participants on the other side of the dispute. While unions are to be brought to severe account for their adherents' stepping over the line, other active participants in the dispute, if fighting the union, may receive monetary balm not only to cover loss of wages incurred, but more in the form of punitive damages; and the punitive damages is the vital aspect of the *Russell* and *Gonzales* holdings.

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[18] Brief for petitioners, p. 10-14, UAW vs. Russell, 78 S. Ct. 932.

[19] Brief for petitioners, p. 3, IAM vs. Gonzales, 78 S. Ct. 923.

[20] NLRB vs. Coco-Cola Bottling Company, 350 U. S. 264; NLRB vs. United Steelworkers, ____ S. Ct. ____, June 30, 1958.

Punitive Damages

Punitive damages are variously termed and described, but are essentially extra damages granted because of the defendant's use of malice, recklessness, wilfulness or ill will in committing the acts alleged.[21] There is no limit to the amount of damages but the jury's good sense or the possibility of a trial judge or appellate court upsetting an "excessive" verdict. Four states, Louisiana,[22] Massachusetts,[23] Nebraska,[24] and Washington,[25] (and New Hampshire in some situations[25a]) have by judicial decision rejected the recovery of exemplary damages. In Connecticut, such damages are limited to the amount of plaintiff's expenses of litigation.[26] But in most other states, despite different definitions in text books, articles, and cases, there is not much doubt that exemplary or punitive damages, as in both the *Russell* and *Gonzales* cases, are granted for mental anguish (*Russell*) and mental suffering, humiliation and distress (*Gonzales*),[27] even where the judge charges, as he did in the *Russell* case, on the penalty aspects alone.[28]

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[21] "The terms 'exemplary,' 'punitive,' and 'vindictive' damages are used interchangeably and such damages have also been designated as 'smart money.' They go beyond the actual damages suffered in the case, and are an exception to the general rule that in private actions, the injured party is to be made whole, and that acts worthy of punishment are prosecuted by the state." 16 O. Jur. 2d 141.

However, as an illustration of the confusion existing in defining "exemplary" or "punitive" damages, the lower court in Gonzales, refused to allow "exemplary" damages but allowed the jury to grant damages for "mental suffering," humiliation and distress!

That the torts are not authorized by the union is of no value as a defense as the rules of liability of a principal will apply. Those rules are that exemplary damages may be assessed against a [Principal] for the wilful and wanton acts of a subordinate employee if the officers or agents in whom the management of its affairs is vested have participated in the wrong: (a) by ordering the particular conduct of the agency or by issuing general orders which would naturally produce such wrongdoing, or, (b) by wanton carelessness, selecting or retaining (before the wrongdoing) an unfit servant, or (c) by ratifying the wrongdoing of the agent by approving the culpable conduct, declining to rectify it where it is possible to do so, or keeping in the employ the guilty agent after knowledge of his wrong. See McCormick, Damages § 80 (1935); and see, Oleck, Damages To Persons & Property, §§ 271, 274 (1957 rev.).

[22] Vincent vs. Morgan's etc., 140 La. 1027 (1917).

[23] Burt vs. Advertiser Newspaper Company, 154 Mass. 238 (1891).

[24] Boyer vs. Barr, 8 Neb. 68 (1878).

[25] Spokane Truck and Dray Company vs. Hoefer, 2 Wash. 45 (1891).

[25a] Burton v. Leavitt Stores Corp., 87 N. H. 304, 179 A. 185 (1935).

[26] Dorozka vs. Lavine, 111 Conn. 575 (1930).

[27] Some states by court decision unequivocably hold that exemplary damages are "to compensate plaintiff for wounded feelings, and injured dignity,"

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Thus the most important effect of the *Russell* and *Gonzales* cases, passed over lightly in the majority opinions but hammered at by Chief Justice Warren in the dissenting opinions, is the fact that exemplary damages for loss of work from tortious conduct, instead of a restoration of the status quo, now will be the norm. Employees obviously will prefer to recover large sums of money as damages than just back pay and therefore will seek state court instead of federal board action.

Damages for Mental Suffering

So, a totally new field comprising *mental* suffering arising from illegal union action has arisen. Heretofore, if an employee lost his job through union interference because of expulsion, proper or improper, or because he was a non-member or was wrongfully kept from work by a picket line, he could, through federal action, be reinstated in his job and receive the amount of back pay he lost. Thus, the restoration of the status quo could always be achieved. But now, a vast new area of mental suffering through illegal action of a labor union has been made actionable. Russell received $9,500.00 for his mental suffering; Gonzales $2,500.00. Verdicts may become much higher. For instance, Russell requested $49,500.00 for his mental suffering. This new theory can cause two effects: one, a union without tremendous cash reserves may be deterred from legitimate union activities, or two, a union engaged in a serious labor dispute can be bankrupted.[29] Discussing the first possible effect, Justice Warren said:

> The scant attention the majority pays to the large proportion of punitive damages in plaintiff's judgment cannot

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Wise vs. Daniels, 221 Mich. 229 (1922); Kay vs. Parker, 53 N. H. 342 (1873).

[28] In its charge to the jury, the trial court included the following statement:

> "If, in this case, after considering all the evidence and under the instructions I have given you, you are reasonably satisfied that at the time complained of and in doing the acts charged the [union] . . . actuated by malice and actuated by ill will, committed the unlawful and wrongful acts alleged, you, in addition to the actual damages if any, may give damages for the sake of example and by way of punishing the [union] or for the purpose of making the [union] smart, not exceeding in all the amount claimed in the complaint." (78 S. Ct. 932, p. 935, footnote 3.) See the full list for all states in Oleck, supra, n. 21.

[29] Because the picket line kept hourly-rated and office employees out of the plant in the legitimate strike in the Russell case, suits have been filed against the UAW by 89 persons requesting $1,500,000 in damages (listed in 78 S. Ct. 932, at p. 945, footnote 16), and in all of these cases the time lost from work amounts to a negligible portion of the damages requested.

> disguise the serious problem posed by that recovery. The element of deterrence inherent in the imposition or availability of punitive damages for conduct that is an unfair labor practice ordinarily makes such a recovery repugnant to the federal act. The prospect of such a liability on the part of a union for the action of its members in the course of concerted activities will inevitably influence the conduct of labor disputes. There is a very real prospect of staggering punitive damages accumulated through successive actions by parties injured by members who have succumbed to the emotion that frequently accompanies concerted activities during labor unrest. This threat could render even those activities protected by the federal act too risky to undertake.[30]

Even a union with large cash reserves could be seriously hurt financially. The strike resulting in the *Russell* case was comparatively small. If a union considered engaging in a strike against a large corporation or entire industry, the possibility of damage suits may well have a deterrent effect even to a large and presumably wealthy union. Smaller unions could easily have to face the issue of possible bankruptcy through any type of concerted activity.

Conclusion

The two decisions are of great significance. Is there any relief from the possibility of "staggering punitive damages"? Some possible remedies come to mind: 1) a severe restriction upon punitive damages in loss-of-work cases imposed by the Supreme Court or by state courts in subsequent decisions; 2) Congressional or state action banning exemplary damages as they are now banned in five states; 3) Congressional action returning exclusive jurisdiction to the federal board; and 4) liability insurance for labor unions.

The first three suggested modes of relief are not likely to be granted, although limits imposed by the Supreme Court itself are not inconceivable. That leaves insurance as the only feasible relief. However, two writers question whether liability insurance covering exemplary damages may not be against public policy:

> Insurance against exemplary damages frustrates their purposes and should be considered contrary to public policy.

[30] Dissenting opinion, UAW vs. Russell, 78 S. Ct. 932, at p. 942.

[31] 70 Harvard Law Review 517, at p. 526 (1957). See also 14 Mo. Law Review 175 (1949).

> It is doubtful whether a reckless or malicious defendant will be deterred if he knows that his liability insurer will pay all damages levied against him. Furthermore, payment by the insurance company, in effect, punishes the innocent public which bears the cost through higher premiums.[31]

But the one case specifically on this point carefully considered the public policy argument and rejected it.[32]

However, unless and until barred by law, insurance companies undoubtedly will sell liability insurance to labor unions although the premiums well may be astronomical. Insurance seems to be the only answer at the present time, because lawyers will be found to file the cases against unions whether, paraphrasing John Milton, "their purposes are on the prudent and heavenly interpretation of justice and equity or on the promising and pleasant thoughts of litigious terms, fat contentions and flowing fees."

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[32] Ohio Casualty Insurance Co. vs. Welfare Finance Co., 75 F. 2d 58 (C. C. A. 4, 1934), cert. den., 295 U. S. 734 (1935).